Supreme Court, U.S.
F I L E D
APR 20 1994
OFFICE OF THE CLERK

(2)

No. 93-1498

In The

Supreme Court of the United States

October Term, 1993

ELPIS SAKARIA, *et al.*,

Petitioners,

v.

TRANS WORLD AIRLINES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN RESPONSE TO PETITION

JOHN N. ROMANS, ESQ.
Counsel of Record
KATTEN MUCHIN & ZAVIS
40 Broad Street – Suite 2000
New York, New York
10004-2382
(212) 612-9500

RAYMOND L. MARIANI, ESQ.
Of Counsel

Attorneys for Respondent Trans World Airlines, Inc.

April 20, 1994

10 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Was the court below correct in affirming the district court's exclusion of hearsay statements of the decedent, who survived a significant prior head injury and admittedly suffered from repeated hallucinations?

2. In the absence of a conflict, should this Court review a decision where the court below, after full discovery over three years, granted summary judgment holding that Petitioners did not submit admissible evidence to raise a material issue of fact?

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

BRIEF IN RESPONSE TO PETITION 1

COUNTERSTATEMENT OF THE CASE 1

POINT I There is No Conflict With Any Decision of This Court 3

POINT II There is No Conflict Among The Circuits 5

CONCLUSION 6

TABLE OF AUTHORITIES

Page

CASES

Air France v. Saks, 470 U.S. 392 (1985) 4

Sakaria v. TWA, 8 F.3d 164 (4th Cir. 1993) ..... *passim*

OTHER AUTHORITIES

Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, reprinted in 49 U.S.C. App. § 1502 note (1982) 4

Federal Rule of Evidence 803(2) 4

No. 93-1498

In The

Supreme Court of the United States

October Term, 1993

ELPIS SAKARIA, *et al.*,

Petitioners,

v.

TRANS WORLD AIRLINES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN RESPONSE TO PETITION

Respondent, Trans World Airlines, Inc. ("TWA")[1], respectfully submits this brief in opposition to Petitioners' Petition for a Writ of Certiorari.

COUNTERSTATEMENT OF THE CASE

Long before the events at Rome Airport that are the basis for this lawsuit, Jagdish Sakaria ("the decedent")

[1] Pursuant to Rule 29.1 of this Court, respondent states that TWA has no parent companies, subsidiaries or affiliates that have issued shares to the public.

sustained significant head injuries in a 1978 automobile accident. Pet. App. at 6a. Petitioners do not contest that decedent's memory was impaired and he was left permanently disabled from his job. *Id.* The decedent's neurosurgeon who examined him over the course of several years following the automobile accident testified that the decedent heard non-existent noises and was subject to hallucinations and "confabulations," the recitation of imaginary experiences to fill gaps in his memory. *Id.* This condition often led to the decedent believing that he had experienced violent events that he in fact had only learned of from television or other sources. *Id.* at 14a.

The only proof Petitioners offered, and that their medical expert relied upon, as to the decedent viewing the aftermath of the terrorist attack at the Rome Airport, was the hearsay affidavit of a relative who greeted the decedent upon his arrival in Athens. Although 400 other passengers flew with the decedent, not one ever testified to encountering terrorists, viewing the aftermath of the attack, seeing any bodies or even ambulances, or hearing any sounds associated with the attack. *Id.* at 3a. At no time did any other passenger observe persons wounded or killed during the attack. *Id.* Nor did decedent tell any other passenger that he saw anything connected with the terrorist attack. *Id.* at 15a. Petitioners ignore evidence that decedent may have learned of the attack at the Rome Airport through radio broadcasts as did other passengers.

Similarly, Petitioners allege harsh aircraft cabin conditions, which their medical expert again relied upon, based solely on the excluded hearsay statements of the decedent. Not one of the other passengers ever testified to a "stifling environment" (*id.* at 24a) or provided a

similar description of conditions while the aircraft was stopped on the tarmac. Instead, the worst that could be said of the conditions in the cabin was a "close and warm" atmosphere. *Id.* at 3a. The doors of the aircraft were open for ventilation. At no time during the stopover or on the flight to Athens did any passenger seek medical attention. *Id.* at 4a.

Based on the inadmissible version of events provided through these hearsay statements of the decedent, the testimony of Petitioners' expert, offered in opposition to TWA's summary judgment motion, initially concluded that decedent's heart attack was caused by events at the Rome Airport. When Petitioners' expert was presented with the description of the aircraft and terminal conditions provided by the other passengers, he renounced his conclusion that the decedent's heart attack was caused by his experience in Rome. *Id.* at 16a. Petitioners presented no other testimony to support their contention that conditions at the Rome Airport caused the decedent's heart attack.

POINT I

There is No Conflict With Any Decision of this Court

The decision below rests on the Petitioners' failure to submit evidence in an admissible form which would raise a material issue of fact concerning the causal connection between an uneventful stopover at the Rome Airport and decedent's heart attack. Petitioners are not happy with the decision of the magistrate judge, the district court, and the court of appeals. But they have not shown a conflict with any ruling of this Court.

Petitioners were unable to produce any admissible evidence that decedent's experiences in Rome differed from the unremarkable events described by the other passengers on his flight. As to the hearsay statements that were properly excluded, Petitioners' reliance on one of the touchstones for admission of excited utterances under Federal Rule of Evidence 803(2), a startling event, is misplaced because decedent's ability to mentally process information and communicate facts accurately was untrustworthy. He routinely fabricated events with or without experiencing anything firsthand. For example, when he arrived in Athens and called his wife, decedent inexplicably repeated to her it was a miracle he "didn't go to the Chinese War." Thus, there was no genuine issue with respect to what actually transpired after all reliable admissible evidence was considered by the Court below.

Although Petitioners eventually amended their pleadings to add a Warsaw Convention claim,[2] the court below rested its decision on principles of proximate cause and found it unnecessary to reach any other aspect of Petitioners' Warsaw Convention claim. Therefore, whether sitting in a "close and warm" aircraft cabin constitutes an "accident" under the Warsaw Convention and *Air France v. Saks*, 470 U.S. 392 (1985) need not be determined by this Court as Petitioners suggest.

---

[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, reprinted in 49 U.S.C. App. § 1502 note (1982). The amendment was made by Petitioners' prior counsel, the fourth of five firms who have represented them.

Had the court below found it necessary to address the Warsaw Convention claim, the only basis for finding that an "accident" occurred under the Warsaw Convention would have been the flight description by the other passengers, which hardly depicts an unexpected or unusual event. Moreover, if the conditions decedent experienced did constitute an "accident," the court below correctly held that this would not result in liability of TWA because Petitioners are still unable to submit admissible evidence that the flight events proximately caused his heart attack. Pet. App. at 15a.

Therefore, the decision below does not conflict with any decision of this Court or constitute an important question of federal law which this Court needs to settle.

POINT II

There is No Conflict Among the Circuits

The decision of the court below does not conflict with the decision of any other federal court of appeals for the same reasons set forth in Point I, i.e., it is based on the facts of this case alone and did not reach any aspect of the Warsaw Convention claim other than lack of admissible evidence of proximate cause.

CONCLUSION

The petition should be denied.

Dated: April 20, 1994

Respectfully submitted,

JOHN N. ROMANS, ESQ.
Counsel of Record
KATTEN MUCHIN & ZAVIS
40 Broad Street – Suite 2000
New York, New York
10004-2382
(212) 612-9500

RAYMOND L. MARIANI, ESQ.
Of Counsel

Attorneys for Respondent
Trans World Airlines, Inc.